

Message Text

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ACTION DOTE-00

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DEPT OF TREASURY WASHDC

AMEMBASSY JIDDA

AMEMBASSY TEHRAN

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DEPT PASS TO DEPT OF TRANSPORTATION FOR MENDENHALL/FHWA
AND OPIC FOR BAZARIAN

COMMERCE FOR CAGNE/HEARN

TREASURY FOR OSAA

E.O. 11652: N/J

TAGS: BEXP, EFIN, EAID, FHWA, KU

SUBJ: PERFORMANCE BONDS ON CONSTRUCTION CONTRACTS

REF: (A) KUWAIT 4177, (B) KUWAIT 4126

1. ITEM NO. 2 IN REF A INDICATED THAT KUWAIT'S MINISTRY OF PUBLIC WORKS (MPW) WAS CONSIDERING A PROPOSAL TO REQUIRE USE OF SURETY BONDS FOR PERFORMANCE GUARANTEES IN MOTORWAY CONSTRUCTION CONTRACTS IN LIEU OF A PROVISION ALLOWING SURETY BONDS AS ALTERNATIVES TO BANK GUARANTEES AS ORIGINALLY PROPOSED BY THE FEDERAL HIGHWAY ADMINISTRATION (FHWA) ADVISORY GROUP. ITEM NO 4 OF REF A INCLUDED THE TEXT OF THE CONTRACT PROVISION UNDER CONSIDERATION.

2. THE MINISTRY IS QUITE INTERESTED IN THE SUBSTANTIAL INCREASED PROTECTION OF ITS INTERESTS UNDER THE SURETY BOND PROPOSAL (50 PERCENT SURETY BOND VERSUS 10 PERCENT BANK GUARANTEE) BUT IS LIMITED OFFICIAL USE

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CONCERNED THAT CONTRACTORS FROM SOME COUNTRIES MAY HAVE PROBLEMS

OBTAINING SURETY BONDS. INFORMATION RECENTLY OBTAINED FROM THE SURETY ASSOCIATION OF AMERICA INDICATES THAT THIS CONCERN MAY HAVE CONSIDERABLE VALIDITY.

3. AT THE REQUEST OF THE MINISTRY, A NEW CONTRACT PROVISION WAS DEVELOPED BY THE FHWA ADVISORY GROUP. THE NEW PROVISION ALLOWS SURETY BONDS AS ALTERNATIVES TO BANK GUARANTEES AS ORIGINALLY PROPOSED BY FHWA. THE MINISTRY ASKED THAT AN EFFORT BE MADE TO MAKE SURETY BONS USAGE AN ATTRACTIVE ALTERNATIVE. WHILE THE MINISTRY WISHES TO RETAIN THE 50 PEAKENT SURETY BOND REQUIREMENT, THE BANK GUARANTEE ALTERNATE WILL REMAIN A 10 PERCENT FUARANTEE. UNDER THE SURETY BOND ALTERNATIVE, HOWEVER, THE CONTRACTOR WILL BE ELIGIBLE TO RECEIVE AN ADVANCE PAYMENT OF UP TO 10 PERCENT

OF THE CONTRACT AMOUNT FOR MOBILIZATION WITH NO ADDITIONAL SECURITY. UNDER THE BANK GUARANTEE ALTERNATIVE, THE CONTRACTOR WILL ALSO BE ELIGIBLE FOR A 10 PERCENT ADVANCE PAYMENT BUT WILL BE REQUIRED TO PROVIDE ANADDITIONAL BANK GUARANTEE TO COVER THE ADVANCE PAYMENT.

4. THE MINISTRY'S DECISION IS EXPECTED SHORTLY AFTER LEGAL DETAILS OF SURETY BOND USAGE BY HIGHWAY ORGANIZATIONS ARE RECEIVED FROM FHWA'S WASHINGTON OFFICE (REF B).

5. THE TEXT OF THE REVISED CONTRACT PROVISION NOW UNDER CONSIDERATION FOLLOWS:

PART II -- CONDITIONS OF PARTICULAR APPLICATION

10 PERFORMANCE BOND

THE PROVISIONS OF CLAUSE 10 PERFORMANCE BOND OF PART I -- GENERAL CONDITIONS ARE DELETED AND THE FOLLOWNG SUBSTITUTED.

UPON NOTIFICATION TO THE CONTRACTOR OF THE EMPLOYERS INTENT TO AWARD THE CONTRACT FOR COGJLETION OF THE WORKS, THE CONTRACTOR SHALL SUBMIT A BOND GUARANTEEING FAITHFUL PERFORMANCE OF THE CONTRACT IN ACCORDANCE WITH THE CONTRACT DOCUMENTS.

TWO ALTERNATIVE TYPES OF PERFORMANCE BONDS WILL BE ACCEPT-LIMITED OFFICIAL USE

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ABLE. REQUIREMENTS CONCERNING THE ALTERNATIVE TYPES ARE CONTAINED IN SUB-CLAUSES 10 (1) AND 10 (2) RESPECTIVELY.

EACH OF THE ALTERNATIVE TYPES OF PERFORMANCE BONDS SHALL BE PAYABLE TO THE EMPLOYER ON THE BASIS OF THE PARTICULAR CONDITIONS RELATING TO EACH TYPE. THE PERFORMANCE BONDS SHALL BE RETAINED BY THE EMPLOYER DURING THE PERIOD OF EXECUTION OF THE WORKS AND WILL BE RETURNED TO THE CONTRACTOR AFTER ISSUANCE OF THE

CERTIFICATE OF COMPLETION OF THE WORKS.

THE CONTRACTOR'S TRANSMITTAL OF THE PERFORMANCE BOND TO THE EMPLOYER SHALL STATE SPECIFICALLY WHETHER THE BOND IS SUBMITTED UNDER PROVISIONS OF THE SUB-CLAUSE 10 (1) OR SUB-CLAUSE 10 (2).

10 (1) PERFORMANCE BOND -- ALTERNATIVE NO. 1

THE CONTRACTOR SHALL SUBMIT WITHIN TWENTY (20) DAYS OF NOTIFICATION OF THE EMPLOYER'S INTENT TO AWARD THE CONTRACT AND PRIOR TO EXECUTION OF THE CONTRACT A GUARANTEE FOR THE DUE PERFORMANCE OF THE CONTRACT IN THE SUM OF TEN PERCENT (10 PERCENT) OF THE TOTAL VALUE OF THE CONTRACT WITHIN THE FORM OF A CERTIFIED CHEQUE OR LETTER OF GUARANTEE FROM AN APPROVED BANK IN KUWAIT OR IN THE FORM OF A BOND FROM A KUWAITI INSURANCE COMPANY APPROVED BY THE EMPLOYER. THE PERFORMANCE BOND SHALL BE IN THE FORM STATED IN DOCUMENT I - 8 AND SHALL BE VALID FOR A PERIOD TO COVER THE ACTUAL PERIOD OF EXECUTION OF THE WORKS PLUS NINETY (90) DAYS AND SHALL BE RENEWED IF NECESSARY UNTIL SUCH TIME AS THE CERTIFICATE OF COMPLETION OF THE WORKS IS ISSUED BY THE EMPLOYER.

THE EMPLOYER SHALL HAVE THE RIGHT TO DEDUCT FROM THIS GUARANTEE DIRECTLY AND WITHOUT HAVING TO NOTIFY THE CONTRACTOR OR TAKE ANY LEGAL MEASURES, ANY SUMS DUE THE EMPLOYER AND THE CONTRACTOR SHALL UNDERTAKE TO KEEP THE FULL VALUE OF THE PERFORMANCE BOND UNDIMINISHED AND EQUIVALENT TO TEN PERCENT (10 PERCENT) OF THE TOTAL VALUE OF THE WORKS SHOULD ANY SUMS BE DEDUCTED THEREFROM. IN THE EVENT THAT THE TOTAL VALUE OF THE WORKS IS INCREASED, THE EMPLOYER SHALL HAVE THE RIGHT TO REQUEST AN INCREASE IN THE FULL VALUE OF THE PERFORMANCE BOND TO TEN PERCENT (10 PERCENT) OF THE NEW TOTAL VALUE OF THE WORKS.

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ALL EXPENSES RELATING TO THE FURNISHING AND MAINTAINING OF THIS GUARANTEE SHALL BE THE SOLE RESPONSIBILITY OF THE CONTRACTOR.

QP (2) PERFORMANCE BOND -- ALTERNATIVE NO. 2

THE CONTRACTOR SHALL SUBMIT WITHIN TWENTY (20) DAYS OF NOTIFICATION OF THE EMPLOYER'S INTENT TO AWARD THE CONTRACT AND PRIOR TO EXECUTION OF THE CONTRACT A PERFORMANCE GUARANTEE IN THE FORM OF A SURETY BOND IN AN AMOUNT EQUAL TO FIFTY PERCENT (50 PERCENT) OF THE FULL CONTRACT AMOUNT CONDITIONED UPON FAITHFUL PERFORMANCE OF THE CONTRACT IN ACCORDANCE WITH THE CONTRACT DOCUMENTS. SUCH BOND SHALL BE SOLELY FOR THE PROTECTION OF THE EMPLOYER'S INTERESTS.

THE PERFORMANCE BOND SHALL BE IN THE FORM STATED IN DOCUMENT

I - 8A AND SHALL BE VALID FOR A PERIOD TO COVER THE ACTUAL PERIOD OF EXECUTION OF THE WORKS UNTIL SUCH TIME AS THE CERTIFICATE OF COMPLETION OF THE WORKS IS ISSUED BY THE EMPLOYER.

THE PERFORMANCE BOND SHALL BE EXECUTED BY A SURETY COMPANY OR COMPANIES ACCEPTABLE TO THE EMPLOYER. SUCH SURETY COMPANY OR COMPANIES SHALL BE REPRESENTED IN KUWAIT BY A KUWAITI INSURANCE COMPANY OR KUWAIT BANK ACCEPTABLE TO THE EMPLOYER. THE EMPLOYER WILL CONSIDER PROPOSALS FOR LOCAL REPRESENTATION BY OTHER THAN KUWAITI INSURANCE COMPANIES AND KUWAITI BANKS ONLY UNDER UNUSUAL CIRCUMSTANCES AND WHEN FULLY EXPLAINED AND JUSTIFIED. ANY KUWAITI INSURANCE COMPANY ACTING AS REPRESENTATIVE FOR THE SURETY COMPANY OR COMPANIES SHALL BE AFFORDED THE OPPORTUNITY TO PARTICIPATE IN THE UNDERWRITING OF THE SURETY BOND. ANY CLAIM BY THE EMPLOYER AGAINST THE PERFORMANCE BOND OR OTHER CORRESPONDENCE RELATING TO THE PERFORMANCE BOND SHALL BE DIRECTED TO THE LOCAL REPRESENTATIVE OF THE SURETY COMPANY.

ALL DISPUTES OF DIFFERENCES RELATING TO ANY CLAIMS BY THE EMPLOYER AGAINST THE PERFORMANCE BOND THAT CANNOT BE RESOLVED BY NEGOTIATIONS SHALL BE FINALLY SETTLED BY ARBITRATION UNDER THE RULES OF THE CONCILIATION AND ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE BY ONE OR MORE ARBITRATORS APPOINTED IN ACCORDANCE WITH THE SAID RULES. ANY ACTIONS UNDER THIS PROVISION WILL BE ARBITRATED IN KUWAIT.

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ALL EXPENSES RELATING TO THE FURNISHING AND MAINTANING OF THIS PERFORMANCE GUARANTEE SHALL BE THE SOLE RESPONSIBILITY OF THE CONTRACTOR.

END OF TEXT.
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